

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

July 5, 1995

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 94-3217

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

FRANK BALISTRERI,

Plaintiff-Respondent,

v.

LABOR AND INDUSTRY REVIEW COMMISSION,

Defendant-Appellant,

A.O. SMITH CORPORATION,

Defendant.

APPEAL from an order of the circuit court for Milwaukee County:
FRANK T. CRIVELLO, Judge. *Reversed.*

Before Sullivan, Fine and Schudson, JJ.

PER CURIAM. The Labor and Industry Review Commission appeals from the trial court's reversal of the LIRC's order that Frank A. Balistreri

was ineligible for unemployment benefits after being fired from his job for violation of a work rule. We reverse.

Balistreri was fired from his job at A.O. Smith Corporation for leaving his work area in violation of a company work rule. He was granted unemployment benefits by the LIRC, but his employer appealed. After a hearing, the administrative law judge reversed the award of benefits, and the LIRC affirmed, concluding that “the employe's conduct, punching in and then leaving the worksite for approximately an hour, was misconduct for unemployment compensation purposes.” Balistreri appealed to the circuit court, which reversed the LIRC's decision, noting: “No reasonable person could consider the facts of this case and find [Balistreri] had engaged in misconduct.” The LIRC appeals. Balistreri has moved for costs for a frivolous appeal under § 809.25(3), STATS.¹

On appeal, this court reviews the decision of the administrative agency, not that of the circuit court. *Wisconsin Pub. Serv. Corp. v. Public Serv. Comm'n*, 156 Wis.2d 611, 616, 457 N.W.2d 502, 504 (Ct. App. 1990). The LIRC

¹ Section 809.25, STATS., provides in part:

(3) FRIVOLOUS APPEALS. (a) If an appeal or cross-appeal is found to be frivolous by the court, the court shall award to the successful party costs, fees and reasonable attorney fees under this section.

....

(c) In order to find an appeal or cross-appeal to be frivolous under par. (a), the court must find one or more of the following:

1. The appeal or cross-appeal was filed, used or continued in bad faith, solely for purposes of harassing or maliciously injuring another.
2. The party or the party's attorney knew, or should have known, that the appeal or cross-appeal was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law.

ruled that Balistreri's conduct constituted "misconduct" as defined in § 108.04(5), STATS., and *Boynton Cab Co. v. Neubeck*, 237 Wis. 249, 296 N.W. 636 (1941).² "Misconduct" under this section is:

conduct evincing such wilful or wanton disregard of an employer's interests as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his employer.

Id., 237 Wis. at 259–260, 296 N.W. at 640. Whether certain behavior constitutes misconduct is a question of law. *Milwaukee Transformer Co. v. Industrial Comm'n*, 22 Wis.2d 502, 510, 126 N.W.2d 6, 11 (1964).

A commission's factual findings are binding on this court as long as they are supported by substantial and credible evidence in the record. Substantial evidence is evidence that is relevant, credible, probative, and of a quantum upon which a reasonable fact finder could base a conclusion. Facts of mere conjecture or a mere scintilla of evidence are not enough to support LIRC's findings. The evidence, however, is to be construed most favorably to the commission's findings.

² Section 108.04(5), STATS., provides in part:

An employe whose work is terminated by an employing unit for misconduct connected with the employe's work is ineligible to receive [unemployment] benefits until 7 weeks have elapsed since the end of the week in which the discharge occurs and the employe earns wages after the week in which the discharge occurs equal to at least 14 times the employe's weekly benefit rate.

Legal conclusions drawn by the commission from its factual findings are subject to judicial review. The commission's construction of a statute and its application to a particular set of facts is a question of law. Although a commission's resolution of questions of law does not bind a reviewing court, some deference is appropriate due to the commission's expertise. If the commission's statutory interpretation "reflects a practice or position long continued, substantially uniform and without challenge by governmental authorities and courts," great weight will be accorded the commission's decision. This deference will also be extended to a commission's application of a particular statute to a particular set of facts.

Cornwell Personnel Assocs., Ltd. v. LIRC, 175 Wis.2d 537, 544-545, 499 N.W.2d 705, 707-708 (Ct. App. 1993) (citations omitted).

At the hearing before the ALJ, David Bell, Balistreri's supervisor, testified that when asked about his whereabouts from 3:00 to 5:00 p.m. on August 6, 1992, Balistreri gave conflicting accounts of where he was, including that "he reported to [Bell] at three o'clock." Bell testified: "After ... I had an opportunity to point out that he couldn't have been, with the witnesses that were present, he stated that well then if that's the case, I don't know where I was at, from 3 to 5." Bell testified that Balistreri acknowledged that he was in another work area at 4:00 p.m. when Bell confronted him with another employee's statement to that effect. Bell described Balistreri's demeanor during his questioning as "[a]lert—rather upset," and he testified that Balistreri "did not seem to be impaired." Bell testified that Balistreri told him he was on medication, but that Balistreri did not produce either a bottle or a prescription for the medications. William Grunze, a manager for A.O. Smith, testified that he saw Balistreri at 3:55 p.m. on that day, away from his work area, walking through the parking lot toward the main gate. Grunze testified that Balistreri was "walking quite briskly and then he stopped at the stop sign ... and he was standing there and he was fidgeting around.... He didn't seem to be impaired or anything when he walked." Balistreri argues that he was impaired by medication he was taking for various health conditions and that he did not

intentionally violate the work rules. The evidence, however, amply supports the LIRC's finding that Balistreri deliberately violated the work rule. In 1988, Balistreri was suspended for similarly violating a work rule by being absent from his work area without authorization. He was told that he would be fired if he violated the rule again. In light of this, and in light of the deference that we must give to the LIRC, we reverse the trial court.

By the Court. – Order reversed.³

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

³ Balistreri claims that the LIRC's appeal is frivolous. *See* § 809.25(3), STATS. It is not. We deny Balistreri's motion for costs authorized by § 809.25(3).